Supreme Court, U.S.
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No. _____

In the Supreme Court
of the United States

TERM: OCTOBER, 1998

ALEKSANDR KASHUBA,
Petitioner,
v.
LEGION INSURANCE COMPANY,
c/o HAMILTON BALLARD;
DIRECTOR OFFICE OF WORKERS
COMPENSATION PROGRAMS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 14, 1998.

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70 pp

QUESTIONS PRESENTED

1. Under the Longshore and Harbor Workers' Compensation Act, notice of an injury must be given to the employer within 30 days after the employee is aware or should have been aware of the relationship between the injury and the employment. Under Section 912(d) of the Act, however, failure to give notice does not bar the claim if "...the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice..." Both the Benefits Review Board (BRB) and the courts interpreting Section 912(d) have placed the burden of proving prejudice on the employer.

The primary question presented for review is whether an employer can satisfy its burden of proof under Section 912(d) without offering any evidence that subsequent to presentation of a late claim it attempted to investigate the claim and that its attempt was fruitless.

2. The Administrative Law Judge (ALJ) is the factfinder under the Act. In this case, the ALJ stated in her Decision and Order: "Thus it cannot be found and concluded under § 12(d)(2) that employer was prejudiced by claimant's failure to give timely notice." The BRB affirmed the ALJ's Decision and Order. The Ninth Circuit, reversing the BRB's affirmation of the ALJ's decision, stated: "Because we find that Employer was prejudiced by the lack of timely notice, Kashuba is not entitled to benefits..."

The secondary question presented for review is whether the Ninth Circuit exceeded its review authority under Section 921(c) of the Act and this court's decision in Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 US 121, 117 S Ct 1953, 138 L Ed2d 327 (1997).

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

On the issues raised by this petition, the petitioner, Aleksandr Kashuba, was a respondent before the Ninth Circuit Court of Appeals. The Director, Office of Workers' Compensation Programs was also a respondent in that proceeding.

On the issues raised by this petition, Northwest Marine Incorporated and Legion Insurance Company c/o Hamilton Ballard were the petitioners before the Ninth Circuit Court of Appeals.

The Court of Appeals' case number was CA 96-70915. The Benefits Review Board case number was 95-1169A.

On issues not raised by this petition, but arising out of the same litigation, petitioner Aleksandr Kashuba was also a petitioner before the Ninth Circuit Court of Appeals. Northwest Marine Incorporated, Legion Insurance Company c/o Hamilton Ballard, and The Director, Office of Workers' Compensation Programs were respondents.

The Court of Appeals' case number was CA 96-70850. The Benefits Review Board case number was 95-1169.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ALEKSANDR KASHUBA, Petitioner,

v.

LEGION INSURANCE COMPANY, c/o HAMILTON BALLARD; DIRECTOR OFFICE OF WORKERS COMPENSATION PROGRAMS, Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Aleksandr Kashuba, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on March 26, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 139 F3d 1273 and is reprinted in Appendix B hereto. The Order denying the petition for rehearing is reprinted in Appendix A hereto.

The Decision and Order of the Benefits Review Board is not reported. It is reprinted in Appendix C hereto.

The Decision and Order of the Administrative Law Judge is not reported. It is reprinted in Appendix E hereto. The denial of claimant's motion for reconsideration is reprinted in Appendix D hereto.

JURISDICTION

(1) Petitioner's claim was heard before the Office of Administrative Law Judges under the provisions of 33 U.S.C. § 919.

(2) The Administrative Law Judge's Decision and Order was to be reviewed by the Benefits Review Board under the provisions of 33 U.S.C. § 921(b). However, the Benefits Review Board did not review the ALJ's decision but affirmed it pursuant to the Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. No. 104-134, 1996 U.S.C.C.A.N. (110 Stat.) 1321, 1321-219, which provides that cases pending before the Board for more than one year are considered affirmed if not acted upon before September 12, 1996.

(3) The Ninth Circuit Court of Appeals had jurisdiction to review the Order of the Benefits Review Board under the provisions of 33 U.S.C.§ 921(c).

(4) The opinion of the Ninth Circuit Court of Appeals was filed on March 26, 1998. Petitioner's timely petition for rehearing and suggestion of rehearing en banc was denied on June 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 33 U.S.C. §§ 912(a) and (d), and 33 U.S.C.§ 921(c) are set forth below:

> "(a) Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment, except that in the case of an occupational disease which does not immediately result in a disability or death, such notice shall be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Notice shall be given (l) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer." 33 U.S.C. § 912(a)

> "(d) Failure to give such notice shall not bar any claim under this chapter (l) if the employer (or his agent or agents or other responsible official or officials designated by the employer pursuant subsection (c) of this section) or the carrier had knowledge of the injury or death, (2) the

deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure on the ground that (i) notice, while not given to a responsible official designated by employer pursuant to subsection (c) of this section, was given to an official of the employer or the employer's insurance carrier, and that the employer or carrier was not prejudiced due to the failure to provide notice to a responsible official designated by the employer pursuant to subsection (c) of this section, or (ii) for some satisfactory reason such notice could not be given; nor, unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death." 33 U.S.C. § 912(d).

"(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28. Upon such filing, the court shall have

jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage." 33 U.S.C. § 921(c).

STATEMENT OF THE CASE

Claimant Kashuba, an emigrant to the United States in 1989 from the former Soviet Union, suffered an injury to his back in June, 1991. In September, 1991, he underwent surgery for that injury.

On October 21, 1991, Kashuba filed a claim form alleging that the June, 1991 injury occurred during the course of his employment with respondent Northwest Marine, Inc. The claim was received by

Northwest Marine on October 31, 1991 and controverted on November 4, 1991. (R. 11)[1]

Kashuba pursued his claim before the Office of Administrative Law Judges under the provisions of 33 U.S.C. § 919. He sought benefits for temporary and permanent disability, and for medical services. (Decision & Order, p. 6, App.E-9, R.30) Northwest Marine resisted Kashuba's claim on the merits, and also contended that the claim was time barred under the provisions of 33 U.S.C. § 912.

The matter was heard by Administrative Law Judge Ellin M. O'Shea. ALJ O'Shea issued a Decision & Order on November 30, 1994, in which she concluded that Kashuba's back condition and subsequent back surgery occurred in the course and scope of his employment and arose out of work activities at Northwest Marine (App. E-22, R. 37). Thus she awarded Kashuba temporary total disability benefits for the period June 16, 1991 to December 17, 1991 (App. E-29, R. 40).

ALJ O'Shea also found that Kashuba's post-injury earning capacity exceeded his pre-injury average weekly wage, and thus she concluded Kashuba was not entitled to an award of permanent disability (App. E-26-30, R.39-41).

Finally, ALJ O'Shea concluded that Kashuba was not entitled to medical benefits because he did not obtain advance authorization for his medical care and treatment, and because Kashuba's physician did not file a report with Northwest Marine within the time required by § 907(d)(2) of the Act (App. E-29, R.40).

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[1] References to "R." refer to Respondents' Excerpt of Record filed in the Ninth Circuit Court of Appeals.

In awarding Kashuba benefits, ALJ O'Shea rejected Northwest Marine's contention that it had been prejudiced by Kashuba's late filing of the claim. Although she was critical of Kashuba's testimony in some regards, ALJ O'Shea stated:

> "However under Board case law on §20(b) and §12(d)(2), the employer, by substantial evidence, has to prove prejudice by the delay. Argument by its counsel without an evidentiary presentation must be held to be general allegations insufficient to establish employer prejudice. *ITO Corp. v. Director, OWCP*, 883 F.2D 422 (5TH Cir. 1989). This applies to employer's arguments as to its inability prior to 10/31/91 and absent timely notice, and with claimant's employment application's misrepresentations, to investigate the facts as to an injury's occurrence, and a NW-related medical condition given his pre-existing back history. However, there is no evidence as to any such steps taken by employer after notified. The BRB has held evidence as to actual employer/carrier post-notice attempts to develop must be presented, from which it can be found lack of timely notice of injury prejudiced. §20(b). *ITO Corp.* To the extent it is argued claimant's responses to employer's discovery requests thwarted and prejudiced its presentation under § 12, the procedural record since 4/16/93 is not reflective of evidence as to what occurred pre-2/93 and post-10/31/91, on

> which a prejudice holding could be reached.
>
> Thus it cannot be found and concluded under § 12(d)(2) that employer was prejudiced by claimant's failure to give timely notice. The § 12 time limit is no bar to this claim." (App. E-25,26, R. 38-39, Decision and Order).

After Kashuba's request for reconsideration was denied, both Kashuba and employer appealed ALJ O'Shea's Decision and Order to the Benefits Review Board. As noted above, ALJ O'Shea's Decision was affirmed by operation of the Omnibus Consolidated Rescission and Appropriations Act of 1996, because it was not acted upon by the BRB within one year. ALJ O'Shea's Decision and Order thus became the final Order of the agency.

Both Kashuba and Northwest Marine petitioned for review in the Ninth Circuit. Northwest Marine petitioned solely on the issue of prejudice. The Ninth Circuit reversed the award of benefits to Kashuba, holding that ALJ O'Shea's finding that Northwest Marine was not prejudiced by Kashuba's late filing was unsupported by substantial evidence in the record. In so doing, the Court stated: "Because we find that Employer was prejudiced by the lack of timely notice, Kashuba is not entitled to benefits...". 139 F3d at 1274.

Kashuba brings his case before this Court noting jurisdiction pursuant to 28 U.S.C. 1254(1).

REASONS FOR GRANTING THE WRIT

Because the Ninth Circuit committed error in two fundamental yet important ways, petitioner seeks this Court's intervention concerning issues important to the nation's dock and waterfront workers who are covered under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950.

First, the court below held that an employer could establish that it had been prejudiced by a claimant's late notice of injury under Section 912(d)(2) of the Act—and thus defeat the claim in its entirety—without presenting any evidence of post-notice attempts to investigate the claim, and without presenting any evidence that such attempts were futile. That is contrary to decisions of the BRB and that of the Fifth Circuit. It also places an impossible burden on an injured longshoreman, and essentially writes Section 912(d)(2) out of the Act.[2]

Second, the court substituted its judgment for that of the factfinder on the issue of prejudice, something it is not supposed to do under longstanding law from this Court. Rather than remand the case to the ALJ (if indeed the ALJ's decision was factually unsupported) for further factfinding on the correct issue, the court simply weighed the evidence itself, and

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[2] While the court below correctly stated the rule that "...the burden is on Employer to establish by substantial evidence that it was prejudiced by Kashuba's failure to give timely notice of the injury". 139 F3d at 1275, citing Bivens v. Newport News Shipbuilding and Dry Dock Co., 23 BRBS 233, 1990 WL 284061, *4 (Ben. Rev. Bd. 1990), the court ignored the rule.

entered new findings more to its liking.[3] That is improper, and this Court has so told the Ninth Circuit regarding this very law. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 US 121, 117 S Ct 1953, 138 L Ed2d 327 (1997).

A. The decision is contrary to the rule established by the Benefits Review Board and agreed to by the 5th Circuit. The Ninth Circuit's decision thus creates a conflict with established law, a conflict which affects large numbers of claimants under the LHWCA. This Court should resolve that conflict.

The decision of the Ninth Circuit is contrary to the Benefits Review Board's rule which requires that employers affirmatively prove, by substantial evidence, that they were prejudiced by a late claim. It is also contrary to the Fifth Circuit's rule that employers present evidence, and not just argument, that they were prejudiced by a late claim.

In ITO Corp. v. Director, OWCP, 883 F2d 422 (5th Cir., 1989) the claimant (Aples) injured his back in March, 1980, while working for Ryan-Walsh Stevedoring Co. (Ryan). Medical evidence showed that he suffered a small disc herniation at L5-S1. In October, 1981, he worked for two days at ITO, and

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[3] Even then, the court did not do a very good job of it, for the evidence of prejudice the court found in the record had little or nothing to do with whether the employer could have investigated the claim, but much to do with whether the claim was compensable at all. Employer did not seek review in the Ninth Circuit of the determination by the ALJ that the claim was compensable; it sought review only of the issue of prejudice.

aggravated his back condition by lifting sugar sacks. In July, 1983, he settled his claim with Ryan.

Also in July, 1983, he underwent surgery, which showed herniated discs at L4-5 as well as at L5-S1. He thereafter filed a claim with ITO. ITO raised the defense of late notice, which was rejected by the ALJ and the BRB. In affirming the BRB, the Fifth Circuit stated:

> "ITO argues first that Aples was barred from receiving compensation because he did not timely notify ITO of his injury. The LHWCA requires that notice be given to the employer within thirty days of the injury. But failure to provide notice does not bar a claim in certain circumstances enumerated by the statute. One such instance is where the employer was not prejudiced by lack of notice.
>
> The only suggestion of prejudice ITO advances is a general one of 'no opportunity to investigate the claim when it was fresh * * *'. Such a conclusory claim of prejudice is not persuasive. The determination by the ALJ and the Board that ITO was not prejudiced is supported by substantial evidence and we cannot disturb it." 883 F2d 422, 424 (5th Cir. 1989).

The decision makes good sense, and conforms with longstanding BRB case law regarding proof of prejudice due to late notice of claim.

The primary purposes of the notice and filing requirements of Section 12 are to protect employers and insurers from fraudulent claims and to facilitate investigation of injurious working conditions by requiring the claimants to reveal the existence of an alleged injury or disease within a reasonable time of the claimant's awareness of its existence. Port of Portland v. Director, OWCP, 932 F2d 836, 841 (9th Circ., 1991). To that end, the Benefits Review Board, the agency charged with overseeing adjudications under the Act, has decided that, to establish prejudice under Section 912(d)(2), an employer must come forth with substantial evidence which demonstrates that late notice impaired the employer's ability to investigate the facts and circumstances surrounding the claim for which late notice was given.

In Cox v. Brady-Hamilton Stevedore Company and Martin Re-insurance Company, 25 BRBS 203, 207 (1991), the Board, relying on the statutory presumption (33 U.S.C. Sect 920) that sufficient notice was given to the employer, set forth the rule:

> "* * * Accordingly, employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to claimant's failure to provide adequate notice. See Bivens v. Newport News Shipbuilding and Dry Dock Co., 23 BRBS 233 (1990)."

In Cox, the claimant filed a claim for hearing loss setting forth the wrong date (by over a month) of injury. The employer contended that because of the wrong date on the claim form, it had no obligation to obtain employment records of the claimant beyond the

date of injury alleged, i.e., it had no obligation to investigate further whether claimant worked for employer on other dates when liability for claimant's hearing loss could attach. In affirming the ALJ's finding that employer failed to satisfy its evidentiary burden to prove prejudice, the Board stated:

> "* * * Judge Heyer concluded that there was no reason that employer, once it was notified on July 8, 1980, could not have obtained claimant's employment records through that date and discovered that it could be held liable for claimant's hearing loss." 25 BRBS at 207.

In Bivens v. Newport News Shipbuilding and Dry Dock Company, 23 BRBS 233 (1990), the claimant suffered an injury on September 27, 1983. He filed a claim for injury to his right shoulder, and received treatment. Months later he realized that his left shoulder was also injured. Employer was not put on notice of the left shoulder injury until April 23, 1985, when claimant underwent arthroscopy for that injury. The ALJ found claimant's late filing on the left shoulder "inherently prejudicial" and held the claim time-barred under Section 12. The Benefits Review Board reversed and remanded, stating:

> "* * * Because the administrative law judge did not adequately address the question of whether employer proved that it was, in fact, unable to effectively investigate the claim for the left shoulder injury, we instruct the administrative law judge, on remand, to reconsider the evidence of record relevant to the Section 12(d)(2) inquiry." 23 BRBS at 240

Other Board decisions are in accord. In Bukovi v. Albina Engine/Dillingham and Commercial Insurance Company, and Director, OWCP, 22 BRBS 97 (1988), the Board stated:

> "* * * Contrary to employer's contention, employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim by reason of the claimant's failure to provide timely notice as required by Section 12. Strachan Shipping Co. v. Davis, 571 F.2d 968, 8 BRBS 161 (5th Cir, 1978). Rev'g, 2 BRBS 272 (1975); Williams v. Nicole Enterprises, 21 BRBS 164 (1988). Although employer contends that it would be 'highly inappropriate' to place this burden upon it, (Brief for Employers at 6), its argument overlooks the fact that employer is in a far better position than claimant to know the manner in which it has been prejudiced by claimant's failure to provide timely notice." 22 BRBS at 99.

In Williams v. Nicole Enterprises, 21 BRBS 164 (1988), the Board held as a matter of law that employer did not establish prejudice under Section 12 by simply alleging difficulty in investigating whether the vessel on which claimant was injured was "in navigation", thus precluding compensation to claimant as a "member of the crew."

Kashuba understands that the Board's interpretation of the Act is not given deference by this Court. Director, OWCP v. Newport News Shipbuilding

& Dry Dock Co., 514 US 122, 115 S Ct 1278, 1287, 131 L Ed 2d 160 (1995). However, claimants, employers, insurers, ALJs, and practitioners—across the country–rely on Board precedent in preparing, defending, and deciding cases. In addition to the fact that the rule established by the Board (and adopted by the 5th Circuit) is correctly grounded in the statutory presumption of Section 20, the rule recognizes two very practical considerations: 1) it is the employer which is in the best position to obtain information verifying or discrediting a claim, and 2) it is virtually impossible for a claimant to prove a negative, i.e., that employer has **not** been prejudiced by late filing.

On the other hand, the court's decision here allows employers to do nothing when presented with a late claim. It allows them to avoid doing the things employers routinely do when presented with a timely claim: obtain work records, obtain time sheets, obtain supervisory logs, speak to co-employees, speak to supervisors—all information solely within the employer's control. After performing none of the investigative activities usually done when a claim is filed, the employer is then able to come into the hearing, present no evidence of any efforts to investigate the claim, no evidence of why such an investigation proved fruitless, and yet defeat the claim. In other words, employer can simply present argument, not evidence, and prevail. That is contrary to the Fifth Circuit's decision in ITO Corp. v. Director, OWCP, supra, contrary to good sense, and essentially writes Section 912(d)(2) out of the Act.

The employer's behavior here demonstrates the truth of Kashuba's contention: the claim was filed on October 21, 1991, and received by employer on October 31, 1991. It was denied by employer November 4,

1991, just five days after receipt. Employer presented no evidence that during that five days it did anything whatsoever to determine whether Kashuba's injury occurred as alleged.[4]

That is the mischief of the rule announced by the Ninth Circuit, mischief not allowed by the Fifth Circuit, nor by the Board. The court's decision—particularly as a published opinion—conflicts with long-standing, uniform decisions regarding a law of national application. This Court has recognized the need for uniformity of decisions under the LHWCA. See, for example, Metropolitan Stevedore Company v. Rambo (Rambo I), 515 US 291, 115 S Ct 2144, 132 L Ed2d 226 (1995). It has done so because of the number of workers affected by the law. Cowart v. Nicklos Drilling Co., 505 US 469, 112 S Ct 2589, 120 L Ed2d 379 (1992). ["We granted certiorari because of the large number of LHWCA claimants who might be affected by the Court of Appeals' decision. 502 U.S. 1003, 112 S.Ct. 635, 116 L.Ed.2d 653 (1991)." 112 S Ct at 2594]. It should grant review here and tell the nation's dock workers and their employers that § 912(d)(2) means what it says.

B. The Court of Appeals exceeded its review authority.

The courts of appeal do not review decisions of the Benefits Review Board de novo. 33 USC § 921(c). In Voehl v. Indemnity Ins. of North America, 288 US 162, 53 S Ct 380, 77 L Ed 676 (1933), this Court early

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[4] Proof offered by employer consisted of medical reports and the testimony of a vocational expert on issues unrelated to employer's attempts, or lack thereof, to investigate the claim.

on limited the review by courts of appeals of compensation orders issued by the Deputy Commissioner, the officer then charged with initial fact finding under the Act.[5] In Voehl, the Deputy Commissioner entered a compensation order allowing benefits. The district court affirmed, but the court of appeals for the District of Columbia reversed, "* * * taking a different view of the evidence * * *" than the Deputy Commissioner. 288 US at 166. This Court reversed the Court of Appeals, stating:

> "And when the Deputy commissioner, following the course prescribed by the statute, makes such a determination, his findings of fact, supported by evidence, must be deemed to be conclusive." 288 US at 166.

In Cardillo v. Liberty Mut. Ins. Co., 330 US 469, 67 S Ct 801, 91 L Ed 1028 (1947), this Court confirmed that a reviewing court cannot substitute its judgment for the fact finding made below:

> "If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can

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[5] In 1972, Congress transferred adjudicative functions from the Deputy Commissioners to ALJ's, and district court review of compensation orders to the BRB. Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., 514 US 122, 115 S Ct 1278, 1289, 131 L Ed2d 160 (1995) (Ginsburg, J., concurring in the judgment).

> the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable." 330 US 477-78.

The Ninth Circuit has previously recognized the limit of its review powers in LHWCA cases. In Container Stevedoring Co. v. Director, OWCP, 935 F2d 1544, 1546 (9th Circ., 1991), the court stated, "Like the Board, this court cannot substitute its views for the ALJ's views or engage in de novo review of the evidence."

In this case, however, the court did just that, engaging in fact-finding and substituting its judgment for that of the ALJ on issues far from the only issue that was properly before it: whether employer produced substantial evidence that it was unable to investigate Kashuba's claim because of its untimeliness, and whether as a result of that inability to investigate, it suffered prejudice within the meaning of Section 912(d)(2) of the Act.

Instead, the court decided facts in the first instance which, if anything, were relevant to whether Kashuba's claim was compensable, an issue not raised by employer in its appeal. The facts recited by the court in its opinion had nothing at all to do with demonstrating employer's alleged inability to investigate the claim.

More important than whether the Court was a good or bad factfinder, however, is that the court engaged in factfinding at all. It is not permitted to do so. In Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 US 121, 117 S Ct 1953, 138 L Ed2d 327 (1997), the Ninth Circuit directed entry of a nominal award of

permanent partial disability to an injured longshoreman based upon its own appraisal of the evidence. This Court vacated the judgment, and said:

> "Since the ALJ is the factfinder under the Act, see § 21(b)(3), (c), 33 USC §§ 921(b)(3)(c), however, the Court of Appeals should have remanded to the agency for further findings of fact." 138 L Ed2d at 344.

The Ninth Circuit has entered a decision in conflict with law of another Circuit and that of the Benefits Review Board on an issue important to thousands of maritime workers. It has also, by its method of reviewing an agency decision, departed from the accepted, established, and usual cause of judicial proceedings. This Court should exercise its supervisory powers.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Robert K. Udziela,
Of Attorneys for Petitioner

Dated: September 14, 1998.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST MARINE INC., et al	)	
	)	No. 96-70915
Petitioners,	)	
	)	BRB No. 1169A
v.	)	
	)	ORDER
ALEKSANDR KASHUBA, et al,	)	
	)	
Respondents.	)	

Before: WOOD,* RYMER, and TASHIMA, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Rymer and Tashima have voted to reject the suggestion for rehearing en banc and Judge Wood so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Filed: June 16, 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

* The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALEKSANDR KASHUBA, *Petitioner,* v. LEGION INSURANCE CO., c/o HAMILTON BALLARD; DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, *Respondents.*	No. 96-70850 BRB No. 95-1169
NORTHWEST MARINE INCORPORATED; LEGION INSURANCE COMPANY, *Petitioners,* v. ALEKSANDR KASHUBA; DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, *Respondents.*	No. 96-70915 BRB No. 95-1169A OPINION

Petition to Review a Decision of the Benefits Review Board

Argued and Submitted
November 7, 1997—San Francisco, California

Filed March 26, 1998

Before: Harlington Wood, Jr.,* Pamela Ann Rymer, and A. Wallace Tashima, Circuit Judges.

*The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Opinion by Judge A. Wallace Tashima

SUMMARY

Labor and Employment/Workers' Compensation

The court of appeals granted a petition for review of a decision of the Benefits Review Board (BRB) and denied another. The court held that under the Longshore and Harbor Workers' Compensation Act (LHWCA), an employer need not present evidence of its post-notice attempts to investigate a claim to establish prejudice from untimely notice.

Petitioner Aleksandr Kashuba filed a claim under the LHWCA, alleging that he injured his back on June 14 or 15, 1991 lifting paint cans while working for petitioner Northwest Marine Incorporated. Kashuba had suffered a back injury in 1984, but did not make other reports of back pain until April 1991, when he reported lifting a heavy object weeks earlier. Kashuba did not notify Northwest of his alleged June injury before he underwent surgery for back pain on September 12. Northwest opposed the claim on the ground that Kashuba had not reported the injury and Northwest had no knowledge of it.

An administrative law judge (ALJ) concluded that Northwest had not been prejudiced by Kashuba's failure to give timely notice, citing a lack of evidence of the employer's post-notice attempts to investigate the facts of the alleged injury.

The ALJ noted credibility problems with Kashuba's claim: the April lifting injury could have occurred in March, when he was not working for Northwest; a few days after the alleged injury, Kashuba told a nurse that his pain had decreased since an earlier appointment; no lifting injury was reported at a July appointment, and the physician's report

indicated no exacerbating features to Kashuba's back pain; lifting of paint cans was not indicated on an August report; and the testimony of the only witness to the alleged injury was elicited by leading questions on the crucial facts.

The ALJ ordered Northwest to pay temporary total disability from June 16 through December 17, but denied Kashuba's claim for permanent disability and medical benefits. The BRB upheld the ALJ's decision. Both sides appealed.

[1] Notice of an injury must be given to the employer within 30 days after the employee is aware or should have been aware of a relationship between the injury and the employment. However, failure to give such notice does not bar a claim if the employer has not been prejudiced by the delay. [2] Under the LHWCA, the burden was on Northwest to establish by substantial evidence that it was prejudiced by Kashuba's failure to give timely notice of the injury.

[3] Evidence of the employer's post-notice attempts to investigate the claim is not required to establish prejudice. Evidence that lack of timely notice impeded the employer's ability to determine the nature and extent of the injury or to provide medical services is sufficient; a conclusory allegation of prejudice is not.

[4] Northwest did not receive notice of Kashuba's claim until four months after the alleged injury, and nearly six weeks after he had undergone back surgery. Furthermore, there were many credibility problems with Kashuba's claim. [5] The ALJ's finding that Northwest was not prejudiced by the lack of timely notice was not supported by substantial evidence. If Northwest had received timely notice, it might have been able to produce the evidence it needed to sever the presumed connection between Kashuba's injury and the employment. Northwest was prejudiced by its inability to disprove that it had any liability for the claim at all.

COUNSEL

Jeffrey S. Mutnick, Pozzi Wilson Atchison, Portland, Oregon, for the petitioner in No. 96-70850 and the respondent in No. 96-70915.

Russell A. Metz, Metz & Associates, Seattle, Washington, for the respondents in No. 96-70850 and the petitioners in No. 96-70915.

OPINION

TASHIMA, Circuit Judge:

Aleksandr Kashuba filed a claim for compensation and notice of injury pursuant to the Longshore and Harbor Workers' Compensation Act ("LHWCA"). 33 U.S.C. §§ 901-950. The Administrative Law Judge ("ALJ") granted an award of temporary total disability compensation, but found that Kashuba was not entitled to a permanent partial disability award or medical benefits. In No. 96-70850, Kashuba petitions for review of the Benefits Review Board's ("BRB" or "Board") order affirming the ALJ's decision.[1] In No. 96-70915, Northwest Marine, Inc. and Legion Insurance Company (collectively "Employer") seek review of the finding that Employer was not prejudiced by Kashuba's failure to give timely notice of his injury. We have jurisdiction pursuant to 33 U.S.C. § 921(c), and we grant Employer's petition. Because we find that Employer was prejudiced by the lack of timely notice, Kashuba is not entitled to benefits, and his petition is therefore denied.

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[1]The Board did not review the ALJ decision but affirmed it pursuant to the Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. No. 104-134, 1996 U.S.C.C.A.N. (110 Stat.) 1321, 1321-219, which provides that cases pending before the Board for more than one year are considered affirmed if not acted upon before September 12, 1996. Thus, the ALJ's decision is the final agency decision.

I. STANDARD OF REVIEW

The ALJ's findings must be accepted unless contrary to law, irrational, or unsupported by substantial evidence. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 838 (9th Cir. 1991).

> We ordinarily review the BRB's decisions for errors of law and adherence to the substantial evidence standard. *Id.* In this case, however, the BRB's "decision" was an artifact of Public Law No. 104-134, and it is inappropriate to give deference to an affirmance that did not result from adjudication. Accordingly, we proceed to review the ALJ's decision directly, and will reverse only for errors of law or failure to adhere to the substantial evidence standard.

Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683, 687 (9th Cir. 1997); *see also Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 1111 (9th Cir. 1991).

II. BACKGROUND

Kashuba filed his claim on October 21, 1991, alleging that he injured his back on June 14 or 15, 1991, lifting heavy cans of paint while working for Employer. However, he did not notify Employer of the injury, and, in fact, on September 12, 1991, underwent surgery for back pain.[2] The October 21 claim was Employer's first notice of the June 14 injury.

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[2]In 1984, Kashuba fractured his back in an automobile accident in the former Soviet Union, leaving him hospitalized for twenty days, bedridden several months, and unable to work for three years. At a refugee health screening in January 1990, he reported this injury and complained of continued back pain. Kashuba did not make any other complaints of back pain until April 1991, when he reported lifting a heavy object three weeks earlier.

Employer filed a Notice of Controversion of Right to Compensation, asserting that Kashuba had not reported the injury and Employer had no knowledge of it. After a hearing, the ALJ concluded that Employer was not prejudiced by Kashuba's failure to give timely notice and so ordered Employer to pay temporary total disability for the period of June 16, 1991, through December 17, 1991, but denied Kashuba's claim for permanent disability and for medical benefits.[3]

III. DISCUSSION

[1] 33 U.S.C. § 912(a) provides that notice of an injury must be given to the employer within thirty days after the employee is aware or should have been aware of a relationship between the injury and the employment. However, § 912(d)(2) provides that failure to give such notice does not bar a claim, if the deputy commissioner determines that the employer has not been prejudiced by the delay.

[2] Under the LHWCA, it is presumed that sufficient notice of a claim has been given, absent substantial evidence to the contrary. 33 U.S.C. § 920(b). Therefore, the burden is on Employer to establish by substantial evidence that it was prejudiced by Kashuba's failure to give timely notice of the injury. *See Bivens v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 233, 1990 WL 284061, *4 (Ben. Rev. Bd. 1990).

The ALJ found that Employer had failed to meet this burden, stating that evidence must be presented of an employer's post-notice attempts to investigate the facts of an injury in order to establish prejudice, and that Employer had failed to put forth any such evidence. The ALJ relied on *ITO Corp. v. Director, OWCP*, 883 F.2d 422 (5th Cir. 1989), for this conclusion; however, *ITO Corp.* does not require evidence of an

[3]Kashuba has withdrawn a challenge to the amount of the temporary total disability award.

employer's post-notice attempts to investigate. *See id.* at 424. In *ITO Corp.*, the court merely found that a general claim that the employer had "no opportunity to investigate the claim when it was fresh" was not persuasive. *Id.*

[3] While this Circuit has not required evidence of post-notice investigation in order to show prejudice, we have not established what evidence would be sufficient. The Fifth Circuit has stated that an employer can establish prejudice by providing substantial evidence that failure to receive timely notice of the injury has impeded its ability to investigate to determine the nature and extent of the alleged illness or to provide medical services. *See Strachan Shipping Co. v. Davis,* 571 F.2d 968, 972 (5th Cir. 1978). We conclude that evidence of the employer's post-notice attempts to investigate the claim is not required to establish prejudice. The ALJ thus erred in requiring such evidence. Evidence that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services is sufficient; a conclusory allegation of prejudice is not.

[4] Employer did not receive notice of Kashuba's claim until four months after the alleged injury and nearly six weeks after Kashuba had undergone back surgery. Furthermore, as the ALJ acknowledged, there were many credibility problems with Kashuba's claim. *See* ALJ Decision and Order at 11 (noting "significant credibility problems," "claimant's nebulous, date-unspecific testimony," and problems of his "friendly witnesses' attestions [sic]"). These problems include the following: (1) The lifting injury Kashuba reported in April 1991 could have occurred sometime in March when he was not working for Employer; (2) On June 21, 1991, a few days after the alleged injury, Claimant reported to a nurse that his back and leg pain had decreased since his April 1991 appointment; (3) No lifting injury was reported at a July 8, 1991, appointment, and the physician's report indicated no exacerbating features to his back pain; (4) Lifting of paint cans was not indicated on an August 12, 1991, report; (5) The testi-

mony of the only witnesses to the injury was "elicited in leading fashion on the crucial facts," ALJ Opinion and Order at 8.

Employer also contends that the untimely notice precluded it from conducting a prompt investigation to determine whether the accident had even occurred and its possible relationship to Kashuba's history of back problems, pointing out that Kashuba did not disclose his 1984 spinal injury on his employment application, a fact that would have magnified the need for prompt investigation. Finally, Employer argues that if it had received timely notice of the injury, it could have participated in Kashuba's medical care by, for example, taking measures to prevent him from suffering additional disability and, thus, perhaps avoiding surgery. We agree that Employer should have been able to get a second opinion before Kashuba underwent surgery or at least been informed before such a major procedure.

[5] In light of the foregoing, the ALJ's finding that Employer was not prejudiced by the lack of timely notice is not supported by substantial evidence. The credibility problems, including the problems with dates and Kashuba's reports of back pain, indicate that if Employer had received timely notice of the injury, it may have been able to produce the "specific and comprehensive" evidence it needed to sever the presumed connection between Kashuba's injury and the employment. *Parsons Corp. v. Director OWCP,* 619 F.2d 38, 41 (9th Cir. 1980). Employer thus was prejudiced by its inability to disprove that it had any liability for the claim at all.

Our conclusion is supported by the purposes behind the timely notice requirement—effective investigations, providing effective medical services, and preventing fraudulent claims. *See Port of Portland,* 932 F.2d at 841 (noting that the primary purposes of the notice requirement are "to protect employers and insurers from fraudulent claims and to facili-

tate prompt investigation of injurious working conditions"); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146, 152 (3d Cir. 1975) ("Certainly a major reason for the thirty-day notification rule is to protect the employer from meritless claims by enabling it to undertake a prompt investigation to determine the nature and extent of the employee's alleged injury.").

For the foregoing reasons, we **GRANT** the petition for review in No. 96-70915, and reverse the order affirming the ALJ's finding that Employer was not prejudiced. The prejudice resulting from the lack of timely notice also precludes Kashuba from receiving permanent disability compensation and medical benefits. We therefore **DENY** Kashuba's petition, in No. 96-70850.

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

Re: Aleksandr Kashuba v. Northwest Marine, Inc., Legion Insurance Company, Director, Office of Workers' Compensation Programs (Case No. 93-LHCA-1909) (OWCP No. 14-0108404) (BRB No. 95-1169A)

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provisions of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 26, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, which have been pending before the Benefits Review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP 12, 1996

/s/ Thomas O. Shepherd, Jr.
Clerk of the Board

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	)	
	)	Case No. 93-LHC-1909
ALEKSANDR KASHUBA,	)	
	)	
Claimant,	)	OWCP No. 14-108404
	)	
v.	)	
	)	
NORTHWEST MARINE, INC.,	)	
	)	
Employer,	)	
	)	
LEGION INSURANCE CO., c/o HAMILTON BALLARD,	)	
	)	
Carrier,	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	)	
	)	
Party In Interest.	)	

DENIAL OF CLAIMANT'S MOTION FOR RECONSIDERATION

Claimant's Motion for Reconsideration of the 11/30/94 Decision and Order issued in this matter has been received, with employer/carrier's 12/28/94 Response, and a copy of claimant's Notice of Appeal to the BRB. Although the latter does not indicate the 20 C.F.R. §802.208(a)(7) pending modification

information, it is assumed claimant intended to pursue his 12/19/94 Motion here.

The claimant's Motion for Reconsideration has been considered. It is Ordered, denied.

/s/
ELLIN M. O'SHEA
Administrative Law Judge
Dated: January 6, 1995
San Francisco, California

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	)	
	)	Case No. 93-LHC-1909
ALEKSANDR KASHUBA,	)	
	)	
Claimant,	)	OWCP No. 14-108404
	)	
v.	)	
	)	
NORTHWEST MARINE, INC.,	)	
	)	
Employer,	)	
	)	
LEGION INSURANCE CO., c/o HAMILTON BALLARD,	)	
	)	
Carrier,	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	)	
	)	
Party In Interest.	)	

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For the Employer/Carrier

Before: ELLIN M. O'SHEA, Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This is a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act"). 33 U.S.C. §901 et seq.; 20 C.F.R. Parts 701 and 702; 29 C.F.R. Part 18.

Procedural Case History at OALJs

Pre-Hearing Procedural History and Rulings

The procedural history below is set forth because of insufficient time to do so on the record 4/5/94.

This matter has had a litigious history since 4/6/93 referral. Prior to its first calendar call setting and on 5/6/93 respondents' Motion to Compel Attendance at a Vocational Evaluation was received and granted by Judge Edward C. Burch 5/27/93. No response to the Motion was received from claimant.

Its 1/24/94 calendar call setting was continued on respondents' counsel's 10/13/93 request made on his receipt of the 10/7/93 Notice of the 1/24/94 setting. The granted continuance was on the basis of prior judicial commitments. An affidavit attesting to these commitments is in the record. Claimant had requested the case remain on calendar given his client's non-receipt of benefits, to see if Mr. Metz' prior judicial commitments would in the meantime settle, resolve or reschedule, making him available the week of 1/24/94.

On 11/19/93 the matter was rescheduled for 4/4/94 calendar call. Respondents' Friday 2/18/94 Motion to Compel Discovery Answers to Interrogatories served on claimant 12/17/93, was received. It included a certification, as my Pre-Trial Order Notice directed be included, that prior to Motion's filing a good faith effort to amicably overcome objection/obstacle to the proposed discovery had occurred.

Counsel's Motion requested immediate consideration since he was to take claimant's deposition the next week, 2/23/94, and he needed the Interrogatories' Answers in advance. Efforts to set up a conference call prior to 2/23/94 were unsuccessful, as Mr. Mutnick was not available until 2/23/94. Thus, at respondents' request, a conference call was set up for 2/23/94, the day of deposition. However that day staff of this Office was advised by staff of Mr. Mutnick's office that the conference call was unnecessary; Mr. Metz who was in Portland for the 2/23/94 deposition, was perfectly happy.

Mr. Mutnick's 3/11/94 letter here was received Monday 3/14/94. This was a day prior to the filing by mail due date of the Pre-Trial Statements of my 11/19/93 Pre-Trial Order. This Order, as well as 3/11/94 letter, is incorporated into the record by this reference. As are all the documents specifically identified and set out in this memoralization of procedural events.

The 3/11/94 letter requested a conference call to resolve discovery issues between counsel. It attached a 3/11/94 letter from Mr. Mutnick to Mr. Metz, which indicated the Interrogatories of respondents' earlier 2/18/94 Motion had apparently not been signed due to

language difficulties and were a subject of continuing contention with Mr. Metz, as were claimant's Request for Production responses. Mr. Mutnick's 3/11/94 letter also indicated Mr. Metz' 3/2/94 letter response to Mr. Mutnick's 2/23/94 (day of deposition) letter, a letter apparently referable to claimant's Requests for Production/Interrogatories, a response to which had occurred earlier in 1/1994, was unsatisfactory to claimant. The specific Interrogatories at issue were not set forth in Motion form so effective ALJ review could occur.

Staff of this office advised Mr. Mutnick that while a conference call would be arranged for 3/16/94, as required by my Pre-Trial Notice the certification as to attempts to amicably resolve was first required. Mr. Mutnick advised staff a Motion to Compel with certification would be forthcoming and a conference call could be set up, as it was, for 3/23/94 at 12:15 p.m.

The parties' Pre-Trial Statements, incorporated into the record were, in the meantime, received here. The claimant's was mailed 3/16/94, the same day his Motion to Compel Discovery was mailed.

At 3/23/94 conference call Mr. Metz indicated that since claimant's 3/16/94 Motion, he had filed responses and additional documents with Mr. Mutnick's office, and had also filed a Response to claimant's Motion.

This Response had not been received in this Office as of this 3/23/94 conference call, and Mr. Mutnick indicated he had not, due to his engagement in trial, had opportunity to review respondents' submissions/Response. Additionally, Mr. Mutnick

advised his time availability for discussion at the noontime 3/23/94 conference call was limited. He was in litigation that day and due to his travel commitments Mr. Mutnick's availability to further discuss the matter, on his opportunity to review Mr. Metz' submissions, was limited for the remainder of the week.

The ALJ indicated the Order Mr. Mutnick requested could not be issued until Mr. Metz' response was considered, and at and in the 3/23/94 conference call, given its constraints, there was insufficient time and information to do so. Thus Mr. Mutnick was to advise this Office after he had opportunity to review Mr. Metz' filings, (received here 3/25/94, U.S. Postal Service 3/22/94 postmark included in the record), as to which of the Interrogatories/Production Requests were still in issue, and if a further conference call was needed.

Mr. Metz' 3/25/94 filings also included his Motion to Compel Discovery and for Sanctions. When a 3/29/94 conference call ws arranged, Mr. Mutnick's time availability for a detailed review to rule as to, and on each parties' Motions contentions on the numerous Interrogatories/Request in issue was again limited. Mr. Mutnick was shortly flying to San Francisco.

It was apparent 3/29/94 this matter would not resolve in any amicable fashion, and the parties were then unable to accommodate each other. Time was limited, 3/29/94, and the 4/4/94 calendar call date was almost at hand. Given these circumstances and the late presentation of the parties' motions to compel discovery, the ALJ indicated her impressions on the points of most immediate need to permit the matter to move forward 4/4/94.

I ruled, given claimant's untimely filed Pre-Trial Statements and given respondents' objections based on untimely disclosure under the Pre-Trial Order, that Dr. Franks' 4/1/94 deposition would not go forward. Claimant could present Dr. Franks at trial. It was ruled on respondents' similar objection, that the lay witnesses would not be presented. It was ruled any surveillance films were to be disclosed to claimant. Respondents advised there were none.

The witnesses' statements which were the subject of claimant's F.R.C.P. Rule 26(b) work-product discovery contention had been stated by claimant as available to the District Director in his 1/22/93 letter to her. For this reason and because employer had established a sufficient basis in necessity and undue hardship given these witnesses' stated language problem, as set forth by claimant, and with trial imminent, the ALJ ruled these witnesses' statements should be served on respondents.

It then developed in 3/29/94 conference call that there were no written statements from these witnesses. From what was indicated was taken, unrecorded oral conversations of the witnesses with claimant's law firm personnel, these recordations, if any, were lawyers' impressions, work-product, and not discoverable under *Hickman v. Taylor*, 329 U.S. 495.

It was ruled however, that because of failure to comply with the Pre-Trial Order, on respondents' objection, these witnesses could not be presented. Further, on claimant's request, on this ruling, that a continuance be granted, this request was denied. The parties were advised the matter would proceed to trial the week of 4/4/94; and any appeal by claimant of

those rulings would, under case law, be considered if presented on appeal after decisions' issuance. The matter would not be continued pending an interlocutory appeal.

The ALJ also advised counsel of her availability for any additional conference calls should they decide such would be fruitful, when more time was available to both.

Thereafter, by 3/30/94 telephone advice, staff of this Office was informed the parties were making some progress and some accommodations as to trial and evidence presentation had been reached. On that basis, the 4/5/94 trial moved forward. At trial it was ruled that claimant should supply respondents with the authorization needed to secure the unemployment agency records.

Subsequent to trial Mr. Mutnick's 4/11/94 letter referring to some of these events/occurrences was received, with its attached copies of his 3/29/94 and 4/1/94 letters to Mr. Metz; Mr. Metz' 3/30/94. All these documents were incorporated into the record.

Hearing

When the matter was heard in Portland OR 4/5/94 the claimant, his wife and co-workers testified, through a Russian translator. Employer presented their VE, Scott Stipe, and employer's exhibits (EX) 1 through 10 were admitted.[1] Claimant presented no exhibits for admission, employer's exhibits covering the documentary evidence he wished to admit.

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[1] As referred to herein: TR = Transcript, EX = Employer's Exhibits.

Employer's Hearing Memorandum was then submitted, here incorporated and considered.

Post-Hearing Evidence Received and Admitted

Employer agreed the depositions of Nadia Vlasenko (marked EX 12) and Nadezhda Osennily, claimant's sister (marked EX 13), taken the day before hearing could be admitted in lieu of their testimony. These depositions transmitted 4/28/94 are hereby admitted, with a copy of Mr. Metz' 5/5/94 letter to the Solicitor reflecting service on the Solicitor.

The 5/6/94 deposition of Dr. Lawrence Franks was received 5/13/94. In accord with counsels' agreement it is admitted, marked EX 14. Also admitted is Mr. Metz' 5/19/94 letter reflecting service of this deposition on the Solicitor.

Employer submitted the State of Oregon records described in Mr. Metz' 5/5/94 transmittal letter/Exhibit List, marked EX 11. It is admitted as such, the Solicitor having been served.

The parties' agreement to the admission of these marked and identified documents is of record.

Post-Hearing Orders

My 4/14/94 Order to Parties on 4/5/94 Trial Events with Due Dates followed the 4/5/94 hearing. Then on receipt of claimant's 6/24/94 letter, my 7/5/94 Order followed, notwithstanding Mr. Mutnick's 4/21/94 letter to the ALJ. These four described documents are also hereby admitted. (See Mr. Metz' 7/27/94 Reply, fn. 1).

The 4/14/94 Order was issued, as indicated, to reflect the due date for receipt of the evidence it was agreed would be submitted post-hearing and to set the 6/24/94 due date for the requested proposed findings from both parties given the open record.

Employer's Proposed Findings were timely received. The record was kept open until 7/29/94, by 7/5/94 Order, because claimant's post-hearing proposals were not timely received. Thus the record closed 7/29/94.

By my 4/14/94 Order the employer was to serve the Seattle Solicitor with a copy of all the post-hearing evidence submitted. The Solicitor was afforded until 6/24/94 to file any comments/ position statement on §8(f), raised by employer. None has been received to date.

Based on the parties' stipulations, the evidence adduced and the arguments/proposed facts submitted the following findings of fact and conclusions of law are reached.

Issues

The issues are: whether claimant suffered a back injury in the course and scope of and arising out of his 6/16/91 employment with Northwest Marine; timely §12 notice; AWW; nature and extent of disability; §8(f); applicability of §7(d)(2) to medical benefits claim and attorney fees.

Background Facts on Claimant

Work

Claimant, age 39 was born in Georgia, USSR, on 3/12/55 and completed formal schooling there comparable to high school in the U.S., taking English for four years. While in the Russian army he learned the skills he later used in his first U.S. job as a furniture maker. He worked in Russia as a film processor or developer in a film laboratory; and as an auto mechanic and inside and outside house painter. He and his wife and four children came to the U.S. and Portland relatives, through Italy, late in 1989. He is Pentecostal, lost many relatives in Russian due to his religion, and testified he left the USSR to escape religious persecution. Portland has a significant community of Russian and similar emigees.

After taking a two to three month course in English as a second language he began work 4/23/90 at his first U.S. job, as a door maker doing carpentry work. This involved much bending over, and some woods he worked on were pretty heavy. He attested that while doing this 10 hour a day work, he experienced no back pain from the serious back injury he had suffered in Russia. He was hired at $6.00 an hour. This was raised to $6.30 hourly a month before 9/18/90 when he secured the Northwest Marine (NW) painter job, at $13.50 hourly, in which the injury at issued occurred.

He worked regularly at NW Marine for five and a half weeks, from 9/18/90 until 10/25/90 layoff. A month later, beginning 11/27/90 he again worked for NW for about what appears to be a month, at

EX 5.35-36, until 12/16/90, when again laid-off.[2] Sometime within this period when laid-off from NW he also did painter work for Cascade General. EX 6.37. Then, in the new year, about mid 1/1991 he was reemployed by NW for a little less than two weeks until 1/27/91 layoff. Claimant's work record, Mr. Stipe's testimony and that of the lay witnesses indicate shipyard work is subject to layoffs.

NW's records reflect he returned to work with them 3/27/91 and worked 10 days or two weeks until 4/9/91. Two months later, on 6/7/91, he was reemployed by NW and worked eight days until 6/16/91 layoff.

Pre 6/1991 Medical History

Claimant testified he fractured his back in an U.S.S.R. automobile accident. He was hospitalized 20 days, was in bed 2-3 months, was unable to work for three years and on 1/30/90, he stated he was thereafter on light work only. EX 2.9. During this time he was paid government benefits and his wife worked.

When claimant was seen 1/9/90 for refugee screening at the Multnomah County Health Services Division (hereinafter "Services") where this injury was noted, it was also noted, through an interpreter, he was bothered by complaints of spinal pain when lifting heavy objects. His complaints were bad with sitting or standing too long and his legs, sometimes both, felt

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[2] Employer's proposed findings at pg. 5 indicate claimant began N.W. work 11/27/90 and worked until second layoff 1/27/91. Claimant's proposed finding is similar, at pg. 5, What the specific dates in EX 5.35-36 reflect is not addressed by either party.

weak. On 1/31/90 referral for physician evaluation of his back pain due to this spinal injury, Dr. Wagenback's analysis on examination, where occasional left leg numbness was reported, was questionable left radiculopathy. He ordered x-rays with CT to be considered if claimant's symptoms persisted. EX 2.10.

On 4/15/91 the claimant telephoned with complaints, through an interpreter, of low back pain for four weeks, progressively worsening. He stated this condition had been diagnosed in the U.S.S.R. as radiculitis. He told an LPN when seen 4/16/91 he had lifted a heavy object three weeks before, (which would date to 3/26/91), and he had progressively increasing radiating back pain, similar to what had occurred in the U.S.S.R. 10-15 years before. Whether this recorded statement was made through an interpreter is not noted. The RN who earlier on 4/16/91 had recorded his history through a Russian interpreter, indicated he had low back complaints of four weeks duration (which would date to 3/19/91).

When seen by Dr. Allers 4/16/91 this physician on examination diagnosed a back strain with a questionable S1 herniated disc. Dr. Allers noted claimant dated the back pain for which he sought medical attention to lifting 30 pounds three weeks before. Dr. Allers recorded claimant, due to subsequently increasing pain, had had to stop work. Dr. Allers did not record when he had to stop work. By both parties' proposed findings, after 1/27/91 layoff, and prior to 6/7/91, claimant worked for NW only 3/27/91 through 4/9/91. His NW work records indicate eight hour days all work days but weekends 3/27/91 through 4/8/91. EX 5.36.

Claimant did not return for the 5/13/91 appointment Dr. Allers recommended. It was indicated 5/13/91 he had to go to work. The record does not indicate where claimant was then working.

Testimony as to Injury Events

The claimant testified the day he hurt his back at NW he was working with paint cans which were pretty heavy, he thought because it was special paint with lead in it. As he worked he felt back and left leg pain but he continued to suffer with it and Mr. Induskin, his co-worker on the mixing project, switched exertional demands with him and covered for him. He knew a layoff was coming and wanted to continue working.

Sergey Induskin from Estonia has been in the U.S. since 7/19/89. He is currently a shipyard welder at NW's successor. He remembered working for NW at this shipyard as a painter and sandblaster and there were times he and claimant would work together. The last time he so worked with claimant he remembered that in the forenoon they were painting a ship and they took turns carrying the paint cans, which were really heavy. He testified claimant told him, after bringing a paint can, that something had happened to his back. Induskin then did all the paint can carrying himself, and he got the assistance of others to carry the paint cans. He and claimant finished the work day in this fashion. Claimant had told him after lunch he could not even mix the paint and also told Induskin he could not go to tell management of his injury because he would be laid-off and he needed to support his family.

Pyotr Martinov was also a NW painter at the time of the stated injury. He also did not specify or

recall the specific injury dates averred, but attested he last worked in the shipyard in the spring of 1991. He is from claimant's Georgia town, has known him all his life and sometimes attends the same church. He was not working with the claimant the day of his stated injury but was with him at lunch time when claimant told a couple of people he had to lift and pour heavy paint cans which caused the pain and discomfort evident to Martinov that day. Martinov also testified he worked with claimant in the heavy furniture-making work and claimant had no physical problems then.

These lay witnesses are both currently working and they have some basic English speaking abilities. Their direct testimony, taken through an interpreter was many times elicited in leading fashion on the crucial facts as to their knowledge of the work occurrence which is the basis of the stated harm.

Nadezhda Ossenily did not know what happened at the shipyard to cause the back pain she observed her brother in before his 1991 surgery. She testified he told her he worked hard there and had to do some heavy lifting. EX 13. Nadia Vlesenko who did not indicate what her relationship with the claimant was, other than countrywoman, but identified as a niece by Ms. Ossenily, could not remember when in 1991, after his work, she saw claimant suffering badly with pain in his feet. She attested claimant told her that when he was lifting something very heavy, like paint buckets at the shipyard, the labor hurt him.

As given and in content, the testimony of both these women as to the occurrence of NW work events/activities which were statedly responsible for the symptoms/pain they observed in claimant

sometime in 1991 prior to his back surgery, are of little weight on this factual issue.

Given its leading and speculative nature/ foundation, claimant's wife's testimony, on the pivotal issues of NW causation and reasons for post-surgery non-hiring, are also of little weight.

Injury and Employer Knowledge

The employer's first notice and knowledge of the injury at issue was when claimant's 10/21/91 Notice of Injury (Form LS-210) and 10/21/91 claim (Form LS-203) were filed, more than 30 days after his 9/12/91 back surgery.

These Forms stated claimant was injured 6/16/91, and did not report the injury to his supervisor. He stated that when last he worked 6/16/91 and over 6/14/91 to 6/15/91, his job was to pour paint into a barrel or pail and to mix paint in a mixer. The barrels weighted approximately 100 pounds and he picked up 100 pound paint pails to pour. During this period, according to these Forms 201/203, he felt back strain and pull with radiating left leg pain. He stated he finished the project 6/16/91 only by endurance and with great difficulty and he sought a doctor after layoff, not reporting his injury for fear of layoff. EX 1.1-3. Knowledge of this averred injury was first conveyed to employer by claimant's attorney's 10/31/91 letter. EX 1.4. The claim was timely controverted. Also, see TR-17-22 stipulations.

The Harm

Through Dr. Allers of the Services the claimant was referred to Dr. Laurence Franks, a Board certified neurosurgeon. On 8/12/91 examination, with the abnormal clinical findings he demonstrated, and review of the 7/91 CT scan the Service had secured, Dr. Franks concluded claimant had significant lumbosacral disc problems. This included a disc at L5-S1, with stenosis changes at L4-5, and to some degree at L3-4. When his severe low back and left leg pain was no better by 9/4/91, Dr. Franks proceeded to surgery 9/12/91, following myelogram. He performed a left diskectomy and foraminotomy at L4-5 and L5-S1, the findings of which he explained during EX 14 cross-examination, as well as a conservative foraminotomy at L3-4. Claimant left the hospital 9/18/91.

When Dr. Franks saw claimant 10/16/91 he thought he should have sixty days more of welfare and then be assigned a medium work job with no heavy lifting and bending. Dr. Franks indicated he need return only as necessary. EX 14. pgs. 26-28, 29-30. On 12/17/91 examination Dr. Allers indicated by letter claimant could return to work. EX 2.18. See also Allers' 12/14/92 note at EX 2.19 re no limitation in physical activity and no heavy work.

The claimant testified he could not get an immediate appointment after the described work events just prior to layoff, 6/16/91, which caused the pain which is the basis of this injury claim. When seen at the Services 6/21/91, his first visit since 4/16/91[3], the nurse reflected he reported decreased

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[3] Missed 5/13/91 appointment because had to go to work. Where he worked 5/13/91 is not stated.

back and left leg pain with numbness for the last week and a half. This was assumably through an interpreter, but this is not noted. The examining physician that day stated claimant reflected he had chronic low back pain with sciatic radiation many years, but with recent left leg numbness. Medication and x-ray were prescribed.

On 7/3/91, when he phoned the Health Division Services, through an interpreter he related back pain of three weeks duration. On 7/8/91 when first seen by a nurse he reported through an interpreter, chronic/acute pain of increased intensity. When he came back that afternoon for his Dr. Allers' evaluation appointment, some signator recorded his back pain complaints with a notation he was a shipyard painter with no lifting injury voiced. EX 2.14-2.16. Dr. Allers' 7/8/91 impression, with his abnormal findings, was that an S1 disc herniation had to be ruled out. This physician's 7/8/91 history was that while he was then being seen for radiating back pain, there were then no exacerbating features.

With Dr. Allers' 7/16/91 notation, from CT scan, of lumbosacral stenosis and nerve root impingement, and his 7/29/91 examination diagnosis of S1 nerve impingement, Dr. Allers then referred the claimant to Dr. Franks, who as indicated had the results of this SCT scan on his first 8/12/91 visit.

The past history claimant gave Dr. Franks 8/91 through an interpreter was he had broken his back and sustained a compression fracture in Russia. While Dr. Franks initially testified the history he had was that on or about 6/15/91 claimant was lifting paint cans "and so forth" in his NW work when he developed back and left leg pain. EX 14.5, Dr. Franks'

cross-examination testimony indicated that lifting of paint cans is not reflected in his 8/12/91 records/report. These reports, and his 8/12/91 chart notes, but for EX 10, pgs. 87-88, are not evidenced. EX 14.8-9, EX 3. However Dr. Franks 9/12/91 hospital admission recordation dated claimant's very bad back pain back three months, and related to a NW injury as a painter. Other than to record 9/12/91 that claimant stated he began to develop low back and radiating left leg pain and toe numbness while working part time for NW, Dr. Franks 9/12/91 did not specifically or further describe the work circumstances related to him, and alluded to in the 9/12/91 admission report.

From cross-examination, it would appear the lifting of paint cans information came to Dr. Franks only on the day of deposition, mentioned to him by claimant's counsel. EX 14, pgs. 14-15.

After 10/1991 Dr. Franks did not again see the claimant until two years later when he sought Dr. Franks 9/13/93 attention following a 7/7/93 automobile accident. The claimant reported he believed the 1993 injury worsened his post-surgery condition, a condition which, he stated, until 7/7/93, had been solely some residual low back pain and occasional calf aching. Following the 7/7/93 accident he had sought treatment by Dr. Morse, a chiropractor, and filed an insurance claim. EX 7. The 7/7/93 auto injury is the basis of employer's contention this intervening event plays a part in his current complaints.

Causation

Under §20(a) of the Act, as applicable to the claimed 6/16/91 injury, if the claimant shows that he suffered an injury or physical harm, a presumption arises that claimant's injury is compensable. The presumption of casual connection applies, that the harm was caused by the accident or working conditions. 33 U.S.C. §920(a); *Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (BRB 1981). A claimant may also invoke the presumption by showing that his working conditions aggravated, contributed to, accelerated, exacerbated, or combined with a previous condition or infirmity. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (BRB 1986); *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (BRB 1982). To rebut the §20(a) presumption, an employer must introduce evidence which is specific and comprehensive to sever any connection between the claimant's injury and his employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *Parsons Corp. of Cal. V. Director, OWCP,* 619 F.2D 1075, (9TH Cir. 1980).

Claimant has established his 6/1991 back condition and his 9/1991 back surgery harm. There are significant credibility problems with the probative value of his attestions. This includes as to the circumstances and dates of particular NW work activities' conditions which could have caused this harm. However the ultimate finding and conclusion below must be reached even when the claimant's nebulous, date-unspecific testimony as to a work-connected radiating back pain occurrence just prior to layoff, or in the few days 6/14/91-6/16/91 of his Form LS-201, is given lesser weight. It must be reached even when his friendly witnesses' attestions, those of Mr. Induskin and Mr. Martinov, are given lesser weight and full weight is given to the fact Dr.

Franks was first advised of NW paint can lifting activities by claimant's counsel on the day of deposition.

The finding must be reached, on a weighing of all the evidence, even when it is factored in that the claimant's presentation is diluted by the Services' 7/8/1991 recordations he denied a lifting injury, or any exacerbating feature to his 7/8/91 back pain. And is diluted by the fact Dr. Franks' opinions at EX 14, pgs. 12-13, based on assumptions of Health Services' 4/15/91-4/16/91 [4] pain complaint recordations attributable to NW heavy object lifting, are opinions unsupported by what was actually recorded in 4/1991.

The recordations do not indicate the heavy lifting occurred at NW. And the chronology the Health Services' records at EX 2 do record, in juxtaposition to claimant's EX 5 NW work dates, only raise questions as to when the pain complaints for which he saw Dr. Allers 4/16/91 first occurred, whether three to four weeks before, and when, and where, these and the 30 pound lifting incident actually occurred. Further, notwithstanding testimonial representations to the contrary, claimant's statements to treating sources have not indicated an absence of back pain complaints in the pre-9/18/90, or pre-6/1991 period.

Despite this overall discounting, without doubt, the credible facts are as follows. Dr. Franks' EX 3 9/12/91 recordations reflect he was then given a

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[4] As elicited, Dr. Franks' testimony here could be viewed as muddying the probative value of his causation opinions, similar to his misleading direct testimony, as elicited, as to NW pain can lifting conditions related 8/12/91.

history of back pain of three months duration, pain described as developing across claimant's low back and down his leg related to his NW painter work or injury. Further, from information as to Dr. Fanks' 8/12/91 recordations elicited at EX 14 pgs. 14-15, it appears clear that in his 8/12/91 chart note recordation Dr. Franks had, out of claimant's mouth and through a translator, less than two months after 6/16/91, an indication his complaints were attributable to lifting at NW on 6/10/91 or 6/15/91. Additionally, there were acute as well as chronic back findings in Dr. Franks' operative report, and the claimant due to a serious pre-existing condition had a vulnerable back subject to worsening with only minor physical activities. Dr. Franks attested how little and how trivial activities could cause the surgery findings he saw, when the lumbar spine had the pre-existing condition he found on surgery. Then, there is no reason to doubt that in the few days prior to the 6/1991 layoff, and of the specific trauma injury claim at issue, the claimant as a NW painter was performing physical work activities at NW's shipyard. No evidence to gainsay this, or to gainsay some use of his body in shipyard painter activities, has been presented.

Whatever reservations and doubts the factfinder has about other aspects of claimant's presentation, i.e., his reasons for untimely reporting injury and surgery, his attested lack of input into the EX 5 employment application responses, and his attested language limitations affecting his ability to secure and perform the jobs of VE Stipe's testimony, with the facts listed just above, and with evidence medical attention for his back was sought on Friday (6/21/91) after last working 6/16/91, it is my evaluation, on a preponderance of the credited evidence and the reasonable inferences to be drawn therefrom, that the

§20(a) presumption of compensability must be held invoked.

What is distilled from Dr. Franks' muddied testimony is that claimant on 8/12/91 attributed his 8/1991 back condition to his specific 6/1991 NW work. Claimant had a serious pre-existing back condition. By the medical records it was not, notwithstanding testimonial representations, asymptomatic pre-6/15/91. It could be aggravated and affected by minor physical activities, including NW 6/91 shipyard painter activities. Dr. Franks is the one medical records recorder who, through testimony, explained his recordations where the other history/complaints recordations taken within a year of claimant's U.S. arrival, were not always noted as through interpreters.

Thus on these bases it is found and concluded the §20(a) compensability presumption is invoked. There is no evidence to rebut. The claimant's 6/16/91 back condition and subsequent 9/1991 back surgery are found to have occurred in the course and scope of and arose out of his 6/14/91-6/16/91 NW work activities, an immediate, specific trauma experienced.

§12 Notice

§12 of the Act provides that written notice of a traumatic injury must be given to a designated official of the employer and to the Director within 30 days after claimant is aware or should have been aware of the relationship between the injury and his employment. Where not immediately aware of such an injury, notice of injury shall be given within 30 days after the employee is aware, or in the exercise of reasonable diligence or by medical advice should have

been aware of a relationship between the injury and the employment. By claimant's testimony he was immediately aware of a traumatic injury at NW when he experienced on-the-job back pain just prior to 6/16/91 layoff.

The claimant here did not file notice of injury timely, and he does not claim to have done so, rather claiming the benefit of the presumption of §20(b) and the applicability of 12(d) on the timeliness issue. Four months after he knew he was injured at NW, on 10/21/91, he first took action to notify employer of his NW injury. When received 10/31/91, this was claimant's first advice to any representative of employer or carrier of his 6/16/91 injury. Notice to them occurred more than 30 days following his 9/12/91 surgery. Claimant's testimony/presentation establishes these facts.

§12(d) provides that failure to give the required notice will not bar the claim if claimant shows either that employer had knowledge of the injury during the filing period (§12(d)(1)), or that employer was not prejudiced by his failure to give timely notice (§12(d)(2)). *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). *See Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), modifying *Sheek v. General Dynamics Corp.*, 189 BRBS 1 (1985).

Also, under §12(d)(3), the deputy commissioner can excuse failure to give notice on the ground that: (i) the employer or carrier had knowledge of the injury, and the employer/carrier was not prejudiced by failure to provide notice to the official designated to receive notice under §12(c); or (ii), for some satisfactory reason such notice could not be given. §12(d)(3)(i), (ii).

Further §20(b) creates a presumption that, in the absence of substantial evidence to the contrary, sufficient notice of the claim has been given to employer. *Shaller v. Camp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Under this presumption and the Board's case law, employer bears the burden of proving, by substantial evidence, that the delay in notice was prejudicial.

§§12(d)(1) and (3)(i), on the above facts, absent any knowledge by, or notice to employer/carrier, do not apply here. However claimant claims the benefit of §12(d)(2) and §12(d)(3)(ii).

Claimant's explanation of why he did not notify employer of his injury while working in the 6/14/91-6/16/91 period, or at layoff, was not persuasive or believable. This impression is reached given the factfinder's doubts as to his 4/5/94, even when full measure is afforded claimant based on his language limitations/the translation, and in juxtaposition to what Mr. Induskin attested at TR 57:10-14. Additionally he never persuasively explained why having been laid-off, having sought medical treatment 6/21/91, and through Dr. Franks, with surgery then discussed (see EX 2.17 8/26/91 Allers' note), he delayed notifying employer throughout this period, until months later and after his surgery. In the months up to and after 9/12/91 he well knew the injury's economic effect on him. To the extent claimant urges employer's failure to provide Russian language information/supervision constitutes satisfactory reason to excuse his failure of timely notice under §12(d)(3)(ii), this argument is also unpersuasive.

Claimant, notwithstanding his language limitations evidenced the ability to secure assistance in completing job applications, securing employment, and securing knowledge of job performance requirements; and he advised Mr. Induskin, at TR 57, he knew he could report his injury to NW. His language limitations in mid-1991 did not prevent claimant from otherwise conducting his affairs and pursuing his interests, including with private employers, government offices and sources of medical attention, and he had assistance available which he used to pursue other aspects of his interests and activities. As employer argues, case law indicates lack of education, lack of knowledge of potential rights and benefits, lack of sophistication does not constitute a §12(d)(3)(ii) excuse basis. *Arcus v. Sun Shipbuilding and Dry Dock*, 16 BRBS 34 (1983). Further, claimant has not, in the facts here, provided some satisfactory reason why the notice he knew could be given 6/16/91, was not given. §12(d)(3)(ii) does not apply to waive the statute's requirement.

However under Board case law on §20(b) and §12(d)(2), the employer, by substantial evidence, has to prove prejudice by the delay. Argument by its counsel without an evidentiary presentation must be held to be general allegations insufficient to establish employer prejudice. *ITO Corp. v. Director, OWCP*, 883 F.2D 422 (5TH Cir. 1989). This applies to employer's arguments as to its inability prior to 10/31/91 and absent timely notice, and with claimant's employment application's misrepresentations, to investigate the facts as to an injury's occurrence, and a NW-related medical condition given his pre-existing back history. However, there is no evidence as to any such steps taken by employer after notified. The BRB has held evidence as to actual employer/carrier post-notice

attempts to develop must be presented, from which it can be found lack of timely notice of injury prejudiced. §20(b). *ITO Corp.* To the extent it is argued claimant's responses to employer's discovery requests thwarted and prejudiced its presentation under §12, the procedural record since 4/16/93 is not reflective of evidence as to what occurred pre-2/93 and post-10/31/91, on which a prejudice holding could be reached.

Thus it cannot be found and concluded under §12(d)(2) that employer was prejudiced by claimant's failure to give timely notice. The §12 time limit is no bar to this claim.

AWW

Claimant's AWW is found and concluded to be $278.02 a week, under §10(c), (d). This is the AWW employer argues.

Claimant urges a $335.96 AWW based solely on his NW wages of $10,414.90 in the year prior to injury, wages stated to have been earned over 31 weeks. This is the divisor claimant urges, to interpolate his higher NW wages into his potential earnings capacity, under §10(c), with the $335.96 result. However EX 5, pgs. 36-37 does not indicate NW work over 31 weeks. Moreover, claimant's NW work records at EX 5 indicate the intermittent and sporadic nature of his NW work, and of his shipyard work, and the record indicates that shipyard work is irregular. Utilization under §10(c) of all the wages claimant earned in the year period pre-injury, to find a $278.02 AWW is a more reasonable reflection of his §10(c) potential earnings capacity (EXs 4, 6, 7).

Nature/Extent of Disability

Based on the reports of Dr. Franks and Dr. Allers, the record establishes claimant was temporarily totally disabled from 6/16/91 until 12/17/91, at which date he was authorized to return to medium duty work. His condition became permanent under this Act's meaning on that date, and it is so found. *Stevens v. Director*, OWCP, 909 F.2d 1256 (9th Cir. 1990). The evidence does not establish claimant's 1993 automobile injury significantly changed or affected his condition as Dr. Franks and Dr. Allers found it in late 1991.

Claimant thereafter sought and secured unemployment benefits in 1991 and 1992. In 1994, after personal interview, employer's VE Stipe surveyed the local labor market.

Mr. Stipe had opportunity in and out-of-courtroom setting to assess claimant's abilities to communicate in basic English. He also offered opinions as to Portland area job openings in late 1991. In his testimony and report, EX 9, Stipe identified a number of job openings which he opined suitable alternate employment for claimant, with his physical limitations and limited English speaking abilities. These jobs paid from minimum wage to $11.00 hourly. The factfinder's impression is that claimant, notwithstanding his language difficulties, if willing was able to seek, compete for and secure these job openings. He carries on ordinary business and personal activities where the same abilities to communicate in English required to seek, secure and perform these jobs are required. This includes those reflected in employer's proposed finding #40, Ex 11.

The factfinder is of the opinion, similar to Mr. Stipe's, as to the claimant's ability with his language limitation and emigrant background to seek, complete for and secure all the jobs of Mr. Stipe's surveys. These various jobs pay, in 1991 date of injury wages, from $190 a week (at $4.75 hourly), $200 a week (at $5.00 hourly), $240 a week (at $6.00 hourly) up to $400 a week (at $10.00 hourly), and by Mr. Stipe's testimony the average wage of the suitable alternate employment he surveyed was $280 (at $7.00 hourly).

Claimant urges and agrees with the $7.00 hourly figure based on which, at $280 a week, the claimant suffered no §8(c)(21) permanent loss of wage earning capacity. It is so found and concluded.

This finding is, as proposed by employer, in accord with claimant's post-surgery representations as to his abilities, to Unemployment Insurance and to the physician who treated him after this 1993 automobile accident. There is no persuasive evidence his failure post-surgery to diligently seek jobs such as those evidenced as suitable alternate employment through Mr. Stipe's litigation surveys is attributable to other than choice factors, given his other interests and activities, not well-explained by the claimant, and the lack of credibility of his representations in other areas. EX 11.113. Since 1992 he has been an office worker for his church organization, initially as a volunteer, now at $600.00 a month.

§8(f), §7

Given the finding on the permanent disability issue, no finding is reached on §8(f). On the §7(d)(2) issue, claimant pre-10/21/91 did not seek employer's

authorization for medical care and treatment of the 6/16/91 injury, and the record does not reflect evidence the physician giving treatment for this injury filed the report §7(d)(2) requires be filed with employer within ten days of first treatment. Further claimant has not established any persuasive or credible basis for his deliberate failure to do so prior to 10/21/91, nor has he established, under §7(d)(2), any reasonable basis why the first report treatment was not timely filed so it would be in the interest of justice to excuse §7(d)(2)'s requirement. Under §7 of the Act, including §7(d)(1), (2), the claimant has not established his entitlement to such §7 benefits based on his 6/16/91 compensable injury.

Based on the above findings of fact and resulting conclusions of law it is ORDERED:

ORDER

1) Employer/carrier shall pay claimant temporary total disability compensation of $184.34 a week, or 2/3rds of his $278.02 AWW, for the period 6/16/91 through 12/17/91.

2) Employer/carrier shall pay interest on all compensation due and payable from date due to date paid at the rate calculated pursuant to 28 U.S.C. §1961.

3) Claimant's claim for permanent disability under §8(c) is denied.

4) No valid and enforceable claim for medical services was filed in accordance with §7 of the Act.

5) Claimant's counsel shall submit his application for fees and statement of services rendered, since 4/16/93 referral here, with Proof of Service, in accord with the ALJ's 4/14/94 Order. Employer/carrier shall have 10 days from the receipt of the application for fees to file objections

/s/ Ellin M. O'Shea
ELLIN M. O'SHEA
Administrative Law Judge

Dated: NOV 30 1994
San Francisco, California

EOS:brt